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91-555

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CORDELL LINDSEY, JR.,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the ruling of the Texas Court of Appeals, Fourteenth Judicial District, which the Texas Court of Criminal Appeals has refused to review, deny Petitioner's constitutional right to fundamental fairness guaranteed by due process requirements of federal and Texas law and deprive Petitioner of his constitutional right not to be twice put in jeopardy for the same offense, after a verdict has been rendered in a court of competent jurisdiction?

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CORDELL LINDSEY, JR.,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, CORDELL LINDSEY, JR., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Fourteenth Court of Appeals for the State of Texas, and its interpretation and application of Article 44.29(b), Tex. Code Crim. Proc. Ann., the effect of which is to deprive Petitioner of his constitutionally protected right to fundamental fairness in a criminal proceeding as guaranteed by due process requirements of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution. The Texas Court of Criminal Appeals is the court of last resort in criminal proceedings in the State of Texas, and the

Texas Court of Criminal Appeals has refused Petitioner's request for Discretionary Review of the judgment and opinion entered by the Fourteenth Court of Appeals for the State of Texas.

OPINIONS BELOW

There was no written opinion issued by the Texas Court of Criminal Appeals, but a true and correct copy of the Official Notice Card, indicating that the Petition for Discretionary Review has been REFUSED, appears in Appendix A to this Petition. The opinion of the Fourteenth Court of Appeals, State of Texas, in Criminal Appeal No. C14-90-00477-CR is not reported, but true and correct copies of the unpublished Judgment and Opinion appear in Appendix B to this Petition. There was no written opinion issued by the trial court judge in Cause No. 89-41744, County Criminal Court at Law No. 7, Harris County, Texas, and both the Verdict and Sentence of the jury were announced in open court at the conclusion of each phase of the jury's deliberations.

JURISDICTION

The Opinion of the Texas Court of Appeals, Fourteenth Judicial District, was filed on May 9, 1991, and a timely Petition for Discretionary Review was filed with the Texas Court of Criminal Appeals on June 10, 1991. The Texas Court of Criminal Appeals denied the Petition for Discretionary Review on July 3, 1991 as indicated by the Official Notice Card which appears in Appendix A. This Court's jurisdiction is invoked under Title 28, U.S.C., section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution and Article I, Section 19, Texas Constitution, are set forth in Appendices C and D, respectively, to this Petition.

Article 44.29(b), Tex. Code Crim. Proc. Ann., is set forth in Appendix E to this Petition.

Article 37.10(b), Tex. Code Crim. Proc. Ann., is set forth in Appendix F to this Petition.

STATEMENT OF THE CASE

After entering a plea of "not guilty", and following a jury trial in the County Criminal Court at Law No. 7, Harris County, Texas, the Petitioner was convicted on two counts of operating a security guard service without a license as required under the Private Investigators and Private Security Agencies Act, Tex. Rev. Civ. Stat. Ann. art. 4413 (29bb), sections 13(a) and 44(c). Punishment was assessed by the jury at zero (0) days in jail and zero (0) amount of monetary fine, with both the jail term and the fine being probated for a period of three months.

Petitioner made timely appeal to the Texas Court of Appeals, Fourteenth Judicial District, where his conviction was affirmed and the sentence vacated by Opinion and Judgment of the Fourteenth Court of Appeals, filed on May 9, 1991.

Thereafter, Petitioner appealed to the Texas Court of Criminal Appeals, the state court of last resort in criminal proceedings, and his Petition for Discretionary Review was denied on July 3, 1991, without opinion. Appendices C and D, respectively, to this Petition.

In his Petition for Discretionary Review, Petitioner argued that the Fourteenth Court of Appeals had erroneously decided an important question of state and federal constitutional law that either (a) had not been, but should be, settled by the Court of Criminal Appeals or, alternatively, (b) was in conflict with applicable decisions of the Court of Criminal Appeals and the United States Supreme Court. Further, Petitioner argued that the ruling of the Fourteenth Court of Appeals violated the Fifth and Fourteenth Amendments, United States Constitution, and Article I, Section 19, Texas Constitution, in that Petitioner was being deprived of his constitutional right not to be twice put in jeopardy for the same offense, after a verdict has been rendered in a court of competent jurisdiction.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: First, this Petition presents a specific and narrow issue which has been unresolved by this Court, to-wit: whether a criminal defendant is placed in double jeopardy if the prosecution is able to have a new trial on sentencing but the defendant is unable to retry his guilt or innocense, where the jury that originally convicted the accused assessed punishment at no jail time, no monetary fine and probated the sentence. Secondly, would due process for such a defendant include the right to have the same jury which is to assess punishment on retrial also hear all the evidence regarding guilt or innocence of the accused for the offense charged.

Although Article 44.29(b), Tex. Code Crim. Proc. Ann., is a procedural statute, its application to the

Petitioner in this case unconstitutionally deprives him of substantive due process protections, since any measure of fairness and impartiality in a criminal jury trial proceeding must include the right to have the same jury which is to assess punishment also hear all the evidence regarding the Petitioner's guilt or innocence of the offense charged. Petitioner contends that a new trial on both guilt-innocence and punishment is constitutionally required under the circumstances of this case.

Both the Texas and U.S. Constitutions provide for and protect a person's right to trial by jury. Petitioner urges this Court to recognize that this right contemplates a jury will be permitted to understand all the circumstances under which an alleged offense occurred. This will not be true in the instant case unless Petitioner is granted a new trial on both guilt and punishment.

Article 44.29(b), Tex. Code Crim. Proc. Ann., provides:

> "If the Court of Appeals or the Court of Criminal Appeals awards a new trial to the defendant only on the basis of an error or errors made in the punishment stage of the trial, the cause shall stand as it would have stood in case the new trial had been granted by the court below, except that the court shall commence the new trial as if a finding of guilt had been returned and proceed to the punishment stage of the trial under subsection (b), Sec. 2. Art. 37.07, of this Code. If the defendant elects the court shall empanel a jury for the sentenstage of the trial in the same manner as a jury is empaneled by the court for other trials before the court. At the new trial, the court shall allow both the state and the defendant to introduce evidence to show the circumstances of the offense and other

evidence as permitted by Sec. 3 of Art. 37.07 of this Code."

* * *

Under the procedural circumstances designed by Article 44.29(b), the next jury impaneled to consider punishment will only be permitted to consider the type of evidence which a trial judge typically admits during the punishment stage of a trial, e.g., reputation, character and background of the defendant, and nature or circumstances of the offense committed.

This is a critical limitation in the instant case since it appears that the original jury would not have adjudged the Petitioner "guilty" of the offense charged if they had known that the "punishment" they assessed was not legally valid. Indeed, the original jury may well have believed that the Petitioner was "Not Guilty" of having committed a crime, (meaning the requisite intent necessary for criminal culpability was absent) based on their assessment of Zero (0) Dollars monetary fine, and Zero (0) Days in jail. The jury's verdict could well mean the jury members decided that a "technical" violation had occurred under the statutory language they were instructed to apply, and therefore, the jury members only rendered a "Guilty" verdict because they considered themselves technically compelled by the judge's instructions and bound by the statutory language to do so. Significantly, the original jury requested clarification from the trial judge prior to awarding the punishment which has now been reversed by the Fourteenth Court of Appeals, State of Texas. In part, the jury was undoubtedly agonizing over the fairness of a "guilty" verdict since a number of other law enforcement persons

had testified that their interpretation of the statutory licensing requirement under Article 4413, Private Investigators and Private Security Agencies Act, Tex. Rev. Civ. Stat. Ann., was the same as Petitioner's.

A new hearing on punishment only can not possibly afford the Petitioner an adequate protection of his constitutional rights, since the only relevant evidence at the punishment stage of the proceedings are facts which address the Petitioner's character, reputation, and previous offenses, if any. Testimony which would tend to reflect on whether the Petitioner had the requisite intent to knowingly engage in conduct which would make him culpable of a criminal offense, or whether the subject statute is unconstitutional due to vagueness, overbreadth, or impermissible infringement upon protected rights and privileges all of which bear upon the Petitioner's guilt or innocence of the offense charged—will not be permitted during the punishment phase. But clearly, all such matters were presented to and considered by the original jury which decided to grant Petitioner "probation" on the zero (0) days jail time and zero (0) monetary fine.

Petitioner contends the jury felt compelled by the judge's instructions to interpret the applicable statute in such a fashion as to eliminate any possibility of a "not guilty" verdict. Despite being faced with such an instruction, the jury, nonetheless, wanted to insure that no punishment of any nature would be imposed on Petitioner under the circumstances of this case, and the jury felt they had no means to insure this other than by the verdict rendered.

What the Texas appellate courts have done, in deciding to reverse the jury's assessment of punishment

while sustaining the jury's verdict of guilty, effectively grants the prosecution a right to appeal the sentence without affording the Petitioner an opportunity to challenge his conviction. The Petitioner believes such an interpretation and application of Article 44.29(b), Tex. Code of Crim. Proc., places Petitioner in double jeopardy since he stands tried, convicted and sentenced, but now he must have a new trial on sentencing for the *sole* purpose of increasing his sentence, yet he cannot challenge his conviction. Petitioner argued below that the jury's verdict was void. The Texas appellate courts, however, have chosen to uphold the conviction but give the prosecution another trial for sentencing. It is unclear if Petitioner may even challenge the first conviction following the second sentencing, since the Texas appellate courts appear to have ruled that the Petitioner's challenge to the verdict as being void did not constitute a challenge to the conviction itself, only to the sentence imposed.

Even the procedural steps for a new sentencing hearing under Article 44.29(b) are weighted in the prosecution's favor. Despite the statutory language, Petitioner must now insist during a sentencing hearing that he be allowed to present his entire case anew to a second jury, just to preserve his objections for yet another appeal, assuming one is possible after the second jury's verdict, or alternatively, Petitioner must proceed with a more narrow presentation of character and reputation type evidence during the sentencing hearing which will fail to apprise the second jury of all the evidentiary reasons why, in fact, no crime has been committed, or the statute is unconstitutional.

And regardless of what is done at the sentencing hearing, Petitioner is confronted with the absolute necessity of an appeal from the second sentence imposed, since there is no way in which the second jury can assess a punishment which is *less* severe than the original punishment of no fine and no jail.

Nor is there any conceivable way in which the second jury can find the Petitioner "Not Guilty" of the offense charged, under the application of Article 44.29(b). Worse yet, if Petitioner successfully appeals the second sentence, the State may effectively argue that only another "punishment" hearing is required, and continue to block Petitioner's fervent challenge to the unconstitutional interpretation and application of Article 44.29(b) in the case under consideration. Surely such a result must be deemed improper by this Court because it constitutes a violation of the due process protections under both the United States and Texas Constitutions.

Under circumstances such as presented by the Petitioner's appeal, the right to have the same jury that determined guilt assess punishment must be viewed as a substantial due process element of the Petitioner's right to trial by jury and the double jeopardy prohibition must be made applicable to the punishment hearing in this instance where the jury has rendered a verdict which can only be increased on rehearing. Petitioner asserts that he will be twice placed in jeopardy for the same offense alleged if he is retried on the sentence only pursuant to Article 44.29(b), as that statute has been interpreted and applied by the Texas courts in this cause.

Further, and in the alternative, Petitioner asserts that the conviction was completely voided by the incorrect sentence, hence the whole case should have been reversed

and remanded for a new trial. The concept of trial by jury contemplates that an accused has a constitutionally protected right to have the same jury determine punishment that determines guilt. It is for precisely this reason that the Texas Legislature has set a wide range of punishment from which the jury has full discretion to determine the appropriate punishment for a particular defendant, giving adequate consideration to the circumstances under which the alleged offense was committed.

This is particularly so because there are substantial evidentiary matters which can be put before the jury at the guilt or innocence stage of the trial which would not be admissible at a purely punishment stage of the trial, many of which will clearly impact punishment considerations by the jury.

For example, in the instant case the Petitioner is a peace officer as were all of his witnesses, apart from his wife. Petitioner and a number of other peace officers who testified during the trial were engaged in providing Houston area banks with security services to prevent robberies, thefts and other assorted crimes committed against banking institutions. All of the peace officers who testified (including the Petitioner) confirmed that they were of the opinion that the law controlling security guards and guard companies did not apply to peace officers in circumstances such as presented by the subject prosecution. Such testimony clearly would not be admissible at the punishment stage.

At the same time, it is also vitally important for the jury to understand that the statutory violation of which Petitioner stands accused relates to commercially contracted law enforcement services which may well have

prevented robberies and thefts at banking institutions, and that all of the peace officers involved, and the banks who contracted for their services, considered their conduct lawful.

Obviously, the jury in this case did not feel any true "crime" had been committed which is why they concluded no "punishment" was warranted. There had to be compelling reasons for such a decision by the original jury, and those reasons undoubtedly were contained in all the evidence presented during the entire course of the trial proceedings, not simply during the sentencing phase. Any future jury hearing this case should, if due process is to include any measure of fairness to this Petitioner, be allowed to hear "the whole story" in order to correctly assess a punishment which "fits the crime". This is a circumstance which Article 44.29(b), Tex. Code Crim. Proc. Ann., as applied in this case, unconstitutionally prohibits.

Petitioner assigned as error, in the Texas Court of Appeals, Fourteenth Judicial District, the fact that the trial court accepted a jury verdict that was void as a matter of law, citing *Ex Parte Traxler,* 184 S.W.2d 286, 288 (1944). Petitioner argued that the trial court should not have accepted the defective verdict, but instead should have either had the verdict corrected with the jury's consent, or retire the jury again to further consider the verdict. *Eads v. State,* 598 S.W.2d 304 (Tex. Cr. App. 1980). Since the trial court failed to reject the jury verdict, Petitioner appealed and asked that the Fourteenth Court of Appeals reverse and dismiss the case with prejudice. The State conceded that the jury's verdict was not authorized by law (State's Appellate Brief, p. 2), but

argued that Art. 44.29(b), Tex. Code Crim. Proc., was applicable to the instant case and required ". . . a reversal only as to punishment, with a remand to the court below for a punishment hearing in accordance with Art. 44.29(b)." In support of its contention, the State cited *Cooper v. State,* 769 S.W.2d 301, 307 (Tex. App.—Houston [1st Dist.] 1989, no pet.), and *Reed v. State,* 795 S.W.2d 19, 21 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd).

The Court of Appeals decided the case on the transcript of the record and determined ". . . there was no error in the portion of the judgment finding guilt but there was error in the punishment phase of the trial." (Judgment of the Fourteenth Court of Appeals, dated May 9, 1991, in Cause No. C14-90-00477-CR).

However, the relief granted by the Fourteenth Court of Appeals was premised upon the applicability of Art. 44.29(b), Tex. Code Crim. Proc., to the case under consideration; a conclusion which this Petitioner disputes.

For the reasons discussed herein, Petitioner contends the Fourteenth Court of Appeals selected an improper remedy to correct the jury's verdict, given the fundamental nature of the constitutional right involved, and by doing so, the Texas courts have compelled Petitioner to submit himself to double jeopardy.

Historically, when a Texas jury returned a verdict unauthorized by law, the judgment was rendered void. See, e.g., *Ex Parte McIver,* 586 S.W.2d 851 (Tex. Cr. App. 1979); *Spaulding v. State,* F87 S.W.2d 141 (Tex. Cr. App. 1985). The rationale in such cases was that if the punishment assessed by the jury ". . . was not within the universe of punishments applicable to the offense . . ."

then a judgment based upon such a verdict was void, and the only course of action available to an appeals court was to remand the case for a new trial. See, *Ex Parte Johnson,* 697 S.W.2d 605 (Tex. Cr. App. 1985) and cases cited therein.

When faced with a null and void conviction, it was not considered to be double jeopardy for the defendant to be granted a new trial, since the new trial would proceed as if the first trial had never been held. *Ramirez v. State,* 587 S.W.2d 144 (Tex. Cr App. 1979). Thus, where the judgment was reversed and a new trial ordered, a formerly convicted defendant could not constitutionally assert double jeopardy because, with reversal and new trial, such a defendant had an equal opportunity for the new jury to reach a not guilty determination.

However, the Texas Legislature has enacted new laws which not only enlarge the authority of courts to reform judgments, Art. 37.10(b), but also permit reversal for a new hearing on punishment only, Art. 44.29(b). In the instant case, Petitioner believes the Fourteenth Court of Appeals has incorrectly selected Art. 44.29(b) to reverse a jury verdict containing an infirmity which would have previously rendered the verdict void. Petitioner contends the Texas appellate court should have either (1) reversed and dismissed because the judgment was void or (2) reversed and remanded for a new trial on guilt and punishment, since to do otherwise subjects this Petitioner to double jeopardy.

The Texas Court of Criminal Appeals has held that a sentence below the minimum allowed by statute does not invalidate a conviction and that such a conviction will act as a bar to further prosecution for the same offense.

Billings v. State, 245 S.W. 236, (Tex. Cr. App. 1922); *Beasley v. State,* 208 S.W. 538. Here, Petitioner has been convicted by the jury, and the Fourteenth Court of Appeals has affirmed the conviction—therefore, Petitioner will not be able to challenge the conviction in the trial court, even though the jury's verdict assessing punishment has been reversed.

But it is well established that the jury considers all of the evidence adduced at the guilt stage of a trial in determining an appropriate sentence. See e.g., *Duffy v. State,* 567 S.W.2d 197 (Tex. Cr. App. 1978); *Felder v. State,* 564 S.W.2d 776 (Tex. Cr. App. 1978). Indeed, at the guilt stage of a trial, members of the jury could find that " . . . the circumstances of the offense and the facts surrounding it furnish greater probative evidence . . ." than any other evidence. *Wallace v. State,* 618 S.W.2d 67 (Tex. Cr. App. 1981) citing *Duffy v. State,* supra, and cases there cited.

In the instant case, the jury adjudged Petitioner guilty of a Class A Misdemeanor, for which the statutory punishment is as follows:

> ". . . (1) a fine not to exceed $2,000;
> (2) confinement in jail for a term not to exceed one year; or
> (3) both such fine and imprisonment.

Section 12.21, Texas Penal Code, eff. Jan. 1, 1974.

Significantly, the statute does not mandate that the jury MUST assess a fine; nor does the statute require that the punishment MUST include confinement in jail. In other words, under the statute, a jury is given the discretion to impose a fine which is equal to or greater than zero dollars ($0.00), so long as the fine is equal to or less than two thousand dollars ($2,000).

Likewise, the jury has statutory authority to sentence a defendant to confinement in jail for a term which is equal to or greater than zero days, so long as the jail term is equal to or less than one year.

In sentencing Petitioner for conviction of a Class A Misdemeanor, the jury in the instant case had just as much statutory authority to assess punishment at zero dollars fine and zero days in jail, as it had authority to assess punishment at two thousand dollars and one year in jail.

Thus, in the case at hand, the defect in the jury's verdict lies not in the zero days/zero fine assessed for Petitioner, but rather in the fact that the jury found the Petitioner guilty but assessed no punishment. Where there is no punishment assessed, Petitioner argued below that the jury did not properly find guilt beyond a reasonable doubt and the verdict was void.

Petitioner contends that when there is such a glaring conflict between the jury's verdict on guilt and the punishment assessed, neither the trial court nor the Fourteenth Court of Appeals nor the Texas Court of Criminal Appeals should have accepted the jury's finding as to guilt or punishment. See, e.g., *Ex Parte Johnson,* 697 S.W.2d 605 (Tex. Cr. App. 1985).

However, by applying Art. 44.29(b), instead of Art. 37.10(b)] the Texas appellate courts have effectively deprived Petitioner of his constitutional right to be free of further prosecution on the same offense for which he has already been tried and convicted. In its application of Article 44.29(b) to this case, the Texas courts have overlooked the fact that the jury sentenced Petitioner to zero dollars fine and zero days

in jail. Therefore, any punishment which is asssessed other than zero/zero is guaranteed to subject Petitioner to a greater sentencing than that imposed by the original jury (which not only decided guilt but also assessed punishment), yet Petitioner has no opportunity to challenge his conviction other than his original assignment of error to the original verdict which Petitioner contended was void.

For Petitioner to be subjected to such a procedure, under the facts of this case, amounts to giving the State an opportunity to appeal the jury's sentence, take advantage of defects therein, and yet still deny Petitioner any opportunity to obtain the benefit of a not guilty verdict from a second jury. Worse yet, confronted with such an application of Article 44.29(b), this Petitioner must now choose between waiving his right to a jury on sentencing (since only the original trial judge will have heard all the evidence), or proceed with a new jury and try to introduce essentially all the same evidence as was required at the former trial (which may not be possible at the sentencing phase under the procedure set up by Article 44.29(b)), or simply proceed with a more limited amount of evidence before a new jury for sentencing. Regardless of the evidence presented, Petitioner does not even have the possibility of a "not guilty" verdict, and any punishment other than what was originally assessed will either be an increase, meaning fine or jail time or both. Under these circumstances, the best the Petitioner can hope to achieve is what he has already, a conviction for a Class A Misdemeanor, but a sentence with no jail time and no fine, and then the prosecution will likely receive yet another reversal of the sentence on appeal to the Texas courts.

Under the statutory framework of Art. 44.29(b) as applied in this case by the Texas appellate courts, Petitioner is required at a "punishment hearing" to do everything associated with a new trial without the primary benefit thereof, i.e., the possibility of a "not guilty" verdict. Petitioner asks that the Supreme Court of the United States not permit such a result to prevail in Texas. Here, the State gets the opportunity to increase the sentence imposed upon the Petitioner but the Petitioner has no opportunity whatsoever to obtain either a "not guilty" verdict or a lesser sentence!

As applied in this case, the procedure set forth in Art. 44.29(b) amounts to a re-trial on the same offense for which Petitioner has already been tried and convicted—double jeopardy in its most heinous form. Just because the previous jury which heard and considered all the evidence at the previous trial assessed neither fine nor jail time as punishment, the State should not be permitted to now increase the sentence imposed on Petitioner for the same offense of which he already stands convicted, unless, at a minimum, the entire verdict is reversed and a new trial as to both guilt and punishment ordered.

In the present case, the jury's verdict should not be altered once the jury was dismissed. *Shappley v. State,* 520 S.W.2d 766; *Castro v. State,* 42 S.W.2d 779. Nor is reformation appropriate under Art. 37.10(b), since the jury must have had a reasonable doubt regarding the Petitioner's guilt based on the fact that the jury failed to assess any punishment for the offense alleged. Indeed, the jury could well have believed the Petitioner was not guilty of any crime at all, based on the punishment rendered.

Moreover, while it may be argued that Art. 44.29(b) might have some constitutional applications, e.g., where punishment has been incorrectly assessed by the trial court judge to whom the matter would be remanded, Petitioner would suggest that once a jury hands down its verdict any changes in it must be made either with the jury's consent and before the jury's discharge, *Shappley v. State,* 520 S.W.2d 766; *Castro v. State,* 42 S.W.2d 779, or pursuant to Art. 37.10(b), if the verdict and judgment contain punishment that is both authorized and unauthorized.

However, since the jury has been discharged and this is not strictly a case of authorized versus unauthorized punishment, the only constitutionally acceptable alternative in Petitioner's case is to reverse the judgment in full, and either dismiss the case or remand for a new trial as to both punishment and guilt.

In *Smith v. State,* 479 S.W.2d 680, the jury returned a verdict of one year in jail followed by a 12 month probation period. The judge dismissed the jury and began to sentence the defendant. Defendant's counsel objected to the improper verdict of imprisonment and probation so the judge struck the probation from the verdict and sentenced the Defendant to one year imprisonment. The Texas Court of Criminal Appeals reversed, stating:

> "The verdict having been received by the court and entered of record, the court in its judgment and sentence was not entitled to change the verdict of the jury. The verdict having been void at its inception and the trial court not having the authority to change the same in doing so committed reversible error." *Id.* at 681.

The State has argued that where error occurs only in the punishment stage of the trial, Art. 44.29(b) applies, and the appropriate remedy is a reversal only as to punishment, with a remand to the court below for a punishment hearing in accordance with Art. 44.29(b). *Cooper v. State,* 769 S.W.2d 301, 307 (Tex. App.—Houston [1st Dist.] 1989, no pet.), and *Reed v. State,* 795 S.W.2d 19, 21 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd.). However, neither of these cases are factually analogous to the instant case. The Petitioner's verdict, depending on equally plausible interpretations arguably contained both authorized and unauthorized punishment, or contained a conviction but assessed no punishment. Therefore, the holdings in the cases cited by the State were not dispositive of this crucial issue.

In the instant case, the trial court had no authority to alter the verdict once it had been accepted and the jury discharged, *Ramirez v. State,* 587 S.W.2d 144 (Ct. Crim. App. 1979; reh. denied 10/17/79), unless it acted in accordance with Art. 37.10(b), Tex. Penal Code. This the court did not do. Given the facts of this case, a reversal as to punishment only is not constitutionally permissible.

Petitioner asks that the U. S. Supreme Court clarify the constitutionally permissible procedure to be followed by Texas courts, under the circumstances presented by this case where a jury has been discharged and its verdict is challenged on appeal as being void.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the

Texas Courts of Appeals, Fourteenth Judicial District, in this matter, since a Petition for Discretionary Review has been denied by the Texas Court of Criminal Appeals, which is the court of last resort in criminal proceedings in the State of Texas.

DATED: September 28, 1991.

Respectfully submitted,

GORDON R. COOPER, II

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APPENDIX A

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0680-91

STYLE: LINDSEY, CORDELL, JR.

On this day, [7-13-91], the Appellant Petition for Discretionary Review has been refused.

Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

Mail To:
GORDON R. COOPER, II
4103 LaBranch
Houston, TX 77004

Rec'd 7-8-91

APPENDIX B

May 9, 1991

THE FOURTEENTH COURT OF APPEALS

CORDELL LINDSEY, JR.,
Appellant

v.

THE STATE OF TEXAS,
Appellee

NO. C14-90-00477-CR

JUDGMENT

This cause came on to be heard on the transcript of the record. We have inspected the record and find there was no error in the portion of the judgment finding guilt but there was error in the punishment phase of the trial.

The cause is therefore reversed and remanded for a new trial as to punishment. The trial court shall commence the new trial as if a finding of guilt had been returned and proceed to the punishment stage of the trial.

We order appellant to pay all costs in this behalf expended, and that this decision be certified below for observance.

Affirmed in Part, Reversed and Remanded in Part,
and Opinion filed May 9, 1991.

In The
FOURTEENTH COURT OF APPEALS

NO. C14-90-00477-CR

CORDELL LINDSEY, JR.,
Appellant

v.

THE STATE OF TEXAS,
Appellee

On Appeal from the County Criminal Court at Law No. 7
Harris County, Texas
Trial Court Cause No. 8941744

O P I N I O N

Appellant entered a plea of not guilty before a jury to two counts of operating a guard service without the license required under the Private Investigators and Private Security Agencies Act. TEX REV. CIV. STAT. ANN. art 4413 (29bb), §§ 13(a) and 44(c). He was convicted of both offenses and sentenced to zero days in jail and no fine, with both the jail term and the fine being probated for a period of three months.

Appellant raises a single point of error, contending that the trial court erred in accepting the verdict of the jury with respect to the punishment assessed. The State con-

cedes the sentence entered by the trial court is erroneous. The remedy proposed by appellant for the error is to reverse the judgment of the trial court and to dismiss the prosecution against appellant with prejudice. Appellant cites no authority to support his proposed remedy.

The provision under which this prosecution was brought classifies the offense for which appellant was convicted as a Class A misdemeanor. TEX. REV. CIV. STAT. ANN. art. 4413(29bb), § 44(c). A class A misdemeanor is punishable by a fine not to exceed $2,000 or confinement in jail for a term not to exceed one year or by both such fine and imprisonment. TEX. PENAL CODE ANN. § 12.21. Probation may be ordered only where the "punishment assessed by the jury shall be by imprisonment in jail or by a fine or by both such fine and imprisonment." TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4a(b). A sentence below the statutory minimum is void. *Villareal v. State,* 590 S.W.2d 938, 939 (Tex. Crim. App. 1979). Such error affects only the punishment assessed, however. *Mills v. State,* Nos. 01-99-00551-CR & 01-89-552-CR, Slip op. at 2 (Tex. App.—Houston [1st Dist.] January 3, 1191) (not yet reported).

Appellant does not contend there is any error in the judgment of the trial court with respect to its determination of guilt. Therefore, the proper remedy is to sustain appellant's sole point of error and to order a new trial on punishment only. TEX. CODE CRIM. PROC. ANN. art. 44.29(b).

We affirm the judgment of conviction entered by the trial court. We sustain appellant's sole point of error and

vacate the sentence entered by the trial court. We remand this cause to the trial court for a new trial on punishment only.

/s/ ROSS A. SEARS
Justice

Judgment rendered and Opinion filed May 9, 1991.

Panel consists of Justices Robertson, Sears and Draughn.

Do Not Publish. TEX. R. APP. P. 90.

APPENDIX C

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

APPENDIX D

THE TEXAS STATE CONSTITUTION

Article I, Section 19

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

APPENDIX E

TEXAS CODE OF CRIMINAL PROCEDURE ANNOTATED

Article 44.29(b)

If the Court of Appeals or the Court of Criminal Appeals awards a new trial to the defendant only on the basis of an error or errors made in the punishment stage of the trial, the cause shall stand as it would have stood in case the new trial had been granted by the court below, except that the court shall commence the new trial as if a finding of guilt had been returned and proceed to the punishment stage of the trial under subsection (b), Sec. 2, Art. 37.07, of this Code. If the defendant elects, the court shall empanel a jury for the sentencing stage of the trial in the same manner as a jury is empaneled by the court for other trials before the court. At the new trial, the court shall allow both the state and the defendant to introduce evidence to show the circumstances of the offense and other evidence as permitted by Sec. 3 of Art. 37.07 of this Code.

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APPENDIX F

TEXAS CODE OF CRIMINAL PROCEDURE ANNOTATED

Article 37.10(b)

If the jury assesses punishment in a case and if the verdict assesses both punishment that is authorized by law for the defense and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.